

Comments of Massachusetts Attorney General Thomas F. Reilly

to

Department of the Interior Minerals Management Service

on Advance Notice of Proposed Rulemaking Regarding

Alternate Energy-Related Uses on the Outer Continental Shelf

30 CFR Part 285

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In response to widespread concern that there was no statutory authority for such a project on the Outer Continental Shelf (OCS), Congress recently amended Section 8 of the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. § 1337, to authorize the Secretary of the Interior to grant leases on the OCS for alternative energy projects. *See* Section 388 of the Energy Policy Act of 2005. DOI's Minerals Management Service (MMS) is now in the process of developing regulations to implement the agency's new regulatory authority. On December 30, 2005, MMS published an Advance Notice of Proposed Rulemaking (ANPR) soliciting public comment on the general approaches the agency should take in drafting its regulations. In response to the ANPR, Massachusetts Attorney General Thomas F. Reilly offers the following comments. These comments are all relevant to the "program area" that MMS has identified as "access to OCS lands and resources," although the first and last subsections are also relevant to "coordination and consultation."

Overall approach:

The key to intelligent land use regulation is planning, and the same principle should apply to the use of our oceans. Before MMS allows any new development on the OCS, it should produce a thoughtful and comprehensive plan to determine where potential uses should be allowed. MMS should then exercise its regulatory authority consistent with that plan. This will ensure that development is located where we as a society conclude it is appropriate and is prohibited where we conclude it is not. Such a plan should be informed by the best available science. We realize, however, that such planning will also necessarily involve value-based judgments about what uses, if any, are allowed in particular areas. For that very reason, it is critical that the plan be produced through an open public process that relies primarily on state and local input.

We note that MMS' engaging in such planning and committing to exercising its discretion in accordance with such plans is fully consistent with the provisions of the statute. Indeed, that planning dovetails nicely with the "coordinated OCS mapping initiative" and the "coordination and consultation" with state and local officials, all of which are expressly required by the statute. *See* Energy Policy Act of 2005, § 388(b); Outer Continental Shelf Lands Act, § 8(p)(7), 43 U.S.C. § 1337(p)(7).

We have attached pending state legislation that would implement a regulatory regime in state waters. This legislation includes the planning elements that we endorse, and we commend it to you as a potential model.

Projects in the pipeline:

We also want to comment on the applicability of MMS' regulatory authority to projects that had been proposed before the law went into effect, a topic not specifically referenced in the ANPR. Section 388(d) of the Energy Bill is labeled a "savings provision." This section states that under some circumstances, actions that had been "previously authorized" do not need "reauthorization." While there may be some disputes about the exact meaning of this provision, there can be no reasonable debate that any actions that had not been previously authorized enjoy

no protection under the savings provision and therefore need full MMS review and approval. Because Section 388(d) merely states that for certain projects in the pipeline, previously approved actions do not need to be approved again, it is accurately labeled as a “savings provision,” and not a “grandfathering provision.”

I have included this analysis of Section 388(d), even though the conclusions drawn are rather obvious, for two reasons. First, it follows from this analysis that MMS cannot grant any new approvals -- even for projects already in the pipeline -- until it has fully developed the standards it will use in its decisionmaking. Second, the background conclusions drawn with regard to Section 388(d) provide important context for interpreting a separate provision that cross-references that section. This provision generally requires any leases, easements, or approvals be issued only “on a competitive basis” unless the agency determines “that there is no competitive interest.” This requirement does not apply, however, “with respect to projects that meet the criteria established under section 388(d) of [the Act].” Although this language is ambiguous, we believe that the text -- when read in context of the narrowness of the savings provision -- should not be interpreted as exempting unapproved projects from the general competitive bid requirement. By categorically stating in the ANPR that “[t]he Act requires MMS to grant leases, easements and rights-of-way on a competitive basis, unless there is no competitive interest,” MMS appears to agree with our reading of the statute. In any event, even if the language were interpreted as exempting some projects in the pipeline from the competitive bid requirement, this would mean only that competitive bidding was not statutorily required; it would not mean that competitive bidding was prohibited.

Scale of projects authorized:

In exercising its new authority, MMS will be called upon to decide not merely whether a project will interfere with navigation, but also whether it is consistent with congressional policy and standards laid out in OCSLA. The statute limits the maximum area that can be authorized for oil and gas leases to five thousand seven hundred and sixty acres, “unless the Secretary finds that a larger area is necessary to comprise a reasonable economic production unit.” *See* 43 U.S.C. § 1337(b)(1). Even if that limitation does not apply directly to alternative energy projects -- a question that MMS will need to decide before moving forward with its regulations -- the agency should incorporate into its standards the statutory policy against allowing exclusive licenses over large swathes of the OCS. To illustrate the importance of this issue, we note that a pending proposal to construct a wind energy project known as “Cape Wind” would consist of approximately 130 turbines spread over 24 square miles of Nantucket Sound. This would cover almost three times the maximum area authorized under 43 U.S.C. § 1337(b)(1), and in this manner would contradict the intent of OCSLA not to privatize large portions of the OCS. MMS also should set standards to ensure that such projects do not undercut the statutory policy against impairing rights of navigation and fishing in the area (including non-commercial navigation and fishing rights). *See* 43 U.S.C. § 1332(2).

Consistency with State Policies and Executive Order 13158:

In setting its standards, MMS must recognize and address state policies in contiguous coastal waters. Again, the Cape Wind example is illustrative. Nantucket Sound as a whole has been designated an Ocean Sanctuary Area by Massachusetts law, G.L. c. 132A, 13(c), where, among other things, the building of any structure on the seabed and construction of offshore electric generating stations is prohibited. G.L. c. 132A, § 15. Although these state prohibitions do not apply of their own force to the OCS, they nevertheless represent a clear expression of state policy with regard to those waters. OCSLA requires the Department at least to consider and recognize this policy, 43 U.S.C. § 1332(5), as does President Clinton's Proclamation regarding Marine Protected Areas, Executive Order 13158 (May 20, 2000). Moreover, we believe that OCSLA may make these provisions of state law directly applicable to the OCS in waters adjacent to state waters, at least -- as with Nantucket Sound -- the federal waters are surrounded by state waters. *See* 43 U.S.C. § 1333(a)(2). It is therefore of great importance that MMS implement its new authority in a way that fully recognizes state interests in such federal waters.

Thank you for your careful attention to these issues. Please do not hesitate to contact me if you would like additional information.

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